Filed 11/19/08 County of Los Angeles v. Fairmont Specialty Group CA2/2

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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION TWO

COUNTY OF LOS ANGELES, Plaintiff and Respondent, v. FAIRMONT SPECIALTY GROUP, Defendant and Appellant.	B200359 (Los Angeles County Super. Ct. No. SJ2934)

APPEAL from a judgment of the Superior Court of Los Angeles County. Catherine J. Pratt, Commissioner. Affirmed.

Nunez & Bernstein and E. Alan Nunez for Defendant and Appellant.

Raymond G. Fortner, Jr., County Counsel and Brian T. Chu, Deputy County Counsel for Plaintiff and Respondent.

Fairmont Specialty Group (Fairmont) appeals an order denying its motion for relief from bond forfeiture and the ensuing summary judgment entered for respondent County of Los Angeles (County).

We find no error and affirm.

FACTS

On March 11, 2006, Fairmont's agent posted a $20,000 bond for the release of Thienthu Lieu (Lieu) from custody. The bond indicated that Lieu stood charged with sale or transportation of marijuana in violation of Health and Safety Code section 11360, subdivision (a).[1] Fairmont specifically undertook "that [Lieu] will appear in the above-named court on the date above set forth to answer any charge in any accusatory pleading based upon the acts supporting the complaint filed against [him] and as [*sic*] duly authorized amendments thereof."

On March 15, 2006, the District Attorney of Los Angeles County filed a criminal complaint against Lieu charging him with sale or transportation of marijuana (§ 11360, subd. (a)), possession of marijuana for sale (§ 11359), and driving without a license (Veh. Code, § 12500, subd. (a)). The complaint alleged that Lieu suffered a conviction for robbery (Pen. Code, § 211) and served a prison term.

The bond was filed on March 16, 2006.

The case was called on April 5, 2006, for the afternoon session. Lieu was not present. His attorney informed the trial court that Lieu had checked in earlier and had been told to return at 1:30 p.m. The trial court issued a bench warrant, set bail at $100,000 and ordered the bond forfeited.

Notice of the forfeiture was mailed to Fairmont on April 6, 2006.

Fairmont filed a motion to vacate the forfeiture and exonerate the bond. It argued that the trial court lost jurisdiction over the bond when the prosecution added counts and enhancements and alleged acts that were not part of the original bail bond contract.

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[1] All further statutory references are to the Health and Safety Code unless otherwise indicated.

According to Fairmont, it was entitled to exoneration because the complaint materially increased the risk.

In opposition, the prosecution argued that Fairmont specifically guaranteed Lieu's appearance on any charge in the case.

The motion was denied. Summary judgment was entered in favor of the County on June 12, 2007.

This timely appeal followed.

STANDARD OF REVIEW

When an appellate court is asked to review the denial of a motion to set aside bond forfeiture, it examines the record for an abuse of discretion. (*People v. Wilcox* (1960) 53 Cal.2d 651, 656.)

A summary judgment against a surety pursuant to Penal Code section 1306, subdivision (a) is a consent judgment which is normally not appealable. But if the judgment is not entered in compliance with the surety's contractual consent, the judgment can be appealed because it was entered in excess of the trial court's jurisdiction. (*People v. Wilshire Ins. Co.* (1975) 46 Cal.App.3d 216, 219.) This is a legal issue subject to our independent review. (*People v. American Contractors Indemnity Co.* (1999) 76 Cal.App.4th 1408, 1413.)

DISCUSSION

Fairmont contends that when the state changes the conditions of a bail bond without the surety's consent, the surety is discharged. In Fairmont's view, the complaint filed against Lieu changed the conditions of his bond and it is therefore entitled to have the bond exonerated.

We disagree.

1. Bail bond law.

Penal Code section 1278, subdivision (a) sets out a form for bail bond contracts. It provides, similar to the language of Fairmont's bond, that the surety undertakes that the defendant "will appear and answer any charge in any accusatory pleading based upon the acts supporting the charge." (Pen. Code, § 1278, subd. (a).)

When a criminal defendant fails to appear for any occasion where his presence is required, a trial court must declare a bail bond forfeited. (Pen. Code, § 1305, subd. (a).) There are statutory grounds for vacating a forfeiture and exonerating a bond. (Pen. Code, § 1305, subds. (c), (d), (f) & (g).)

The state does not owe a surety "a duty of disclosure in the absence of active concealment or misrepresentation or a showing that the [s]tate had exclusive knowledge of facts that were not known to or reasonably discoverable by the surety." (*People v. Accredited Surety & Casualty Co., Inc.* (2004) 125 Cal.App.4th 1, 5 (*Accredited Sure*ty) [holding that setting set bail below the minimum in the bail schedule without making the findings of fact required under Penal Code section 1275 did not exonerate a surety's bond].) For example, the state has no obligation to disclose the amount of drugs a defendant possesses, his potential sentence and why the trial court set bail below the bail schedule minimum. (*Accredited Surety*, *supra*, 125 Cal.App.4th at p. 8.) If certain facts are important to deciding whether or not to issue a bail bond, the surety can check the trial court file. (*Id*. at p. 10.)

At any time, a surety may surrender a defendant and exonerate a bond under Penal Code section 1300, subdivision (a).

2. The bond was properly forfeited.

When Lieu failed to appear, the trial court was required to declare the bond forfeited under Penal Code section 1305, subdivision (a). The language of the statute is mandatory. The motion to vacate the forfeiture lacked merit. It did not identify a statutory basis for vacatur. We are unaware of any California common law that provides the relief Fairmont requested. When it learned of the charges in the complaint, it had two options. The first option was to stand on the bond. The second option was to surrender Lieu and exonerate the bond.

3. Fairmont argument's are unavailing.

Fairmont suggests that it has a common law defense to the forfeiture of the bond because the risk was materially increased. We reject this argument. There is no common law defense, and the risk was not increased.

To start, Fairmont cites to *People v. McReynolds* (1894) 102 Cal. 308–309 for the proposition that if the state changes the conditions of a bond, then the surety is discharged. This proposition, however, appears in a syllabus that contains a summary of the appellant's argument. The syllabus is not part of the opinion, so it is not citable as law. We shall not consider it.

Next, Fairmont cites *Reese v. United States* (1869) 76 U.S. 13 (*Reese*), which held that a surety was discharged when, without its consent, the defendant and government stipulated to a postponement of the trial for an uncertain duration. (*Reese, supra,* at pp. 18–21.) *Reese*, of course, is not a California case, and does not bind us. Moreover, we conclude that *Reese* is distinguishable.

The postponement changed the conditions of the bond in *Reese* because it changed the amount of time the surety was obligated to retain custody of the defendant so it could produce him for trial. No such change of conditions occurred here. The bond stated that Fairmont "undertakes that [Lieu] will appear in the above-named court on the date above set forth to answer any charge in any accusatory pleading based upon the acts supporting the complaint filed against [him] and as [*sic*] duly authorized amendments thereof." Fairmont guaranteed Lieu's appearance for any charges in the complaint. The risk was not increased and, in any event, the bond was not filed until after the complaint was filed. If Fairmont was concerned that Lieu was a flight risk after the complaint was filed, it could have surrendered him under Penal Code section 1300. And, unlike in *Reese*, Lieu's case was not continued for an uncertain duration such that his flight risk was exacerbated. The final point is that the record does not contain any arrest or booking records, so the complete basis of the arrest is unknown. The indication of charges in the bond does not establish that the arrest was made solely based on a violation of section 11360, subdivision (a).

Fairmont lobbies us to adopt the reasoning of two Colorado opinions, *People v. Smith* (1982) 645 P.2d 864 (*Smith*) and *People v. Jones* (1994) 873 P.2d 36 (*Jones*). Neither case aids Fairmont's cause.

The surety in *Smith* posted a $400 bail bond for a misdemeanor charge of driving under the influence. At an ensuing hearing, the defendant was informed that he was also being charged with a felony that carried a mandatory prison sentence. Bail for the two offenses was set at $1,000. The trial court applied the $400 bond to the new charge. The Defendant obtained a $600 bond from another party. The surety was not advised of the new charge or application of the bond to the new charge. The case was transferred to a district court and the defendant failed to appear. The surety's bond was forfeited. (*Smith, supra,* 645 P.2d at p. 865.)

The *Smith* court reversed the forfeiture. It stated: "When one undertakes a surety obligation, the surety undertakes a calculated risk, and events which materially increase that risk without consent of the surety terminate the obligation of the bond. [Citations.]" (*Smith, supra,* 645 P.2d at p. 865.) The defendant's nonappearance became more likely when he faced mandatory prison. According to the court, the bond should have been released when the case was transferred to the district court and the misdemeanor was combined with a felony. (*Id*. at pp. 865–866.)

It is impossible to analogize the present case to *Smith* because the opinion in *Smith* did not set forth the language of the bond. We do not know if that language was similar to the language of Fairmont's bond. Nor have we been advised as to whether Colorado has as broad a statutory form.

In *Jones,* the sureties posted a $50,000 bond for the release of the defendant from custody on pending drug charges. He was facing a mandatory minimum sentence of 24 years and one day if convicted. The prosecutor added habitual criminal charges and the trial court continued the existing bond. Based on the new charges, the defendant was facing a mandatory life sentence. (*Jones, supra,* 873 P.2d at p. 37.) The defendant failed to appear for trial and the bond was forfeited. The *Jones* court concluded that the risk

had been materially increased and the sureties were discharged unless they consented to the expansion of their risk.

Jones is readily distinguishable. The court explained that the sureties' "risks and obligations . . . were not open-ended, but rather were objectively defined and limited by the terms of the bond agreement to defendant's appearances solely on the drug charges that were then pending against him." (*Jones*, *supra*, 873 P.2d at p. 38.) Fairmont, on the other hand, guaranteed Lieu's appearance on any charges in the accusatory pleading and authorized amendments. Fairmont's risk, based on the statutory form, was more open-ended than the risk in *Jones*.

According to Fairmont, it is entitled to relief under the reasoning of *People v. Resolute Ins. Co.* (1975) 50 Cal.App.3d 433 (*Resolute*). We cannot accede. In *Resolute*, a bond was transferred from a dismissed criminal charge to a new criminal charge based on Penal Code section 1303.[2] The surety was not notified as Penal Code section 1303 required. (*Resolute*, *supra*, 50 Cal.App.3d at p. 434.) The court held that lack of notice exonerated the bond. (*Id*. at pp. 435–437.) The present case does not involve lack of notice under Penal Code section 1303. Thus, the reasoning of *Resolute* does not provide Fairmont any assistance. Further, there is no analogy to *Resolute* because no statute required notice of the filing of the complaint.

Fairmont's reliance on *People v. Surety Ins. Co.* (1983) 139 Cal.App.3d 848, 854 is similarly misplaced because it reiterates the holding of *Resolute* that lack of Penal Code section 1303 notice exonerates a bond.

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[2] Penal Code section 1303 provides: "If an action or proceeding against a defendant who has been admitted to bail is dismissed, the bail shall not be exonerated until a period of 15 days has elapsed since the entry of the order of dismissal. If, within such period, the defendant is arrested and charged with a public offense arising out of the same act or omission upon which the action or proceeding was based, the bail shall be applied to the public offense. If an undertaking of bail is on file, the clerk of the court shall promptly mail notice to the surety on the bond and the bail agent who posted the bond whenever the bail is applied to a public offense pursuant to this section."

DISPOSITION

The judgment is affirmed.

The County shall recover its costs on appeal.

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_____, J.
ASHMANN-GERST

We concur:

_____, P. J.
BOREN

_____, J.
CHAVEZ